No. 83-459

In the Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,
PETITIONER

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
F. HENRY HABICHT, II
Assistant Attorney General
ANNE S. ALMY
DONALD A. CARR
JAMES C. KILBOURNE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether regulations governing ocean salmon fishing off the coast of Washington for 1981, which provided for escapement of sufficient numbers of salmon so that coastal Indian tribes could harvest approximately one half of each run, are within the discretion of the Secretary of Commerce under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1851(a)(1) and (4).

2. Whether the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, has impliedly abrogated the Stevens Treaties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaties and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-459

WASHINGTON STATE CHARTERBOAT ASSOCIATION, PETITIONER

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-22) is reported at 702 F.2d 820. The order of the district court (Pet. App. 1-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1983 (Pet. App. 23-24). A petition for rehearing was denied on June 9, 1983 (Pet. App. 25-26). The petition for a writ of certiorari was filed as of September 6, 1983, on September 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is an offshoot of the longstanding controversy over the allocation of Pacific Northwest salmon between treaty and nontreaty fishermen. Petitioner, an association of several hundred individuals who own and operate charter offices and vessels engaged in the recreational fishing industry, challenges the Secretary of Commerce's restrictions on ocean harvesting of salmon off the coast of the State of Washington. The fishing rights of Indian and non-Indian fishermen under the so-called "Stevens Treaties" [1] have been adjudicated in the continuing case of *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), further proceedings, 459 F. Supp. 1020, aff'd, 573 F.2d 1123 (9th Cir. 1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel*), 443 U.S. 658 (1979). The ocean harvesting restrictions at issue were also the subject of *Hoh Indian Tribe* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981). The factual and legal background of these restrictions is described in the district court's opinion in *Hoh*.

2. The restrictions at issue apply to salmon and steelhead trout. These are "anadromous" fish, which are hatched in the rivers of the Pacific Northwest, migrate to the ocean for a period of maturity, and

---

[1] Treaty of Olympia, July 1, 1855, 12 Stat. 971; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927.

return to their native streams to spawn. During this migration, these fish are prey to fisheries in the ocean waters and, upon return to their native streams, to inland fisheries many of which are operated by Indians pursuant to their treaty rights. While in the open sea, fishing is essentially of mixed stock; ocean fisheries are not generally able to pursue any particular species or fish of any particular origin. Once inland, however, the fish are identifiable as "runs," *i.e.*, groups of fish designated by species, race, and water of origin. See *United States* v. *Washington*, 384 F. Supp. at 405. Ocean and inland fisheries necessarily compete for limited stocks of harvestable fish. A larger allocation of fish to ocean fisheries leaves fewer fish available for inland fisheries and for the escapement needed to maintain and replenish the resource.

The Secretary is responsible for establishing and implementing annual fishery management plans or amendments to such plans under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, throughout the 3-200 mile zone off the coast of the State of Washington.[2] This Court has

---

[2] The Secretary acts upon fishery management plans normally proposed in the first instance by regional councils comprising representatives of affected States and of various groups interested in the resource. 16 U.S.C. 1852-1855. The Secretary must determine that a plan and the regulations to implement it are consistent with certain national standards set forth in the statute. 16 U.S.C. 1854(a). These include achievement of the so-called "optimum yield" from each fishery, which entails a blending of biological and ecological factors with economic and social factors. 16 U.S.C. 1851 (a)(1). These national standards also embrace a concept of fair and equitable allocation of fishing privileges among various United States fishermen, 16 U.S.C. 1851(a)(4), and call

held that that Act (16 U.S.C. 1811, 1812) "clearly place[s] a responsibility on the United States, rather than the State, to police the take of fish in the relevant waters by Washington citizens insofar as is necessary to assure compliance with the [Stevens] treaties." *Fishing Vessel*, 443 U.S. at 688. Accordingly, the Secretary sets the annual limit on ocean harvests of treaty fish at a level that will guarantee treaty fishermen their fair share of the catch, as well as ensuring sufficient escapement to maintain and replenish the resource.

At issue in *Hoh* and in the instant case is the Secretary's methodology for determining the treaty fishermen's share of the expected harvest and the appropriateness of his corresponding ocean fishing management scheme. If, as petitioner suggests, an overall aggregation of all runs of all species in all the river systems of the region is used as the base from which a 50% share is calculated, then tribes residing or fishing on rivers with lower numbers of returning fish could receive substantially less than the 50% maximum allocation established in *Fishing Vessel*, 443 U.S. at 685-686. If, on the other hand, each tribe is guaranteed 50% of the weakest run of fish, then tribes residing or fishing on rivers with greater numbers of returning fish could receive more than 50% of those other runs, to the comparative detriment of ocean fishermen, including petitioner's members. The problem arises because some salmon stocks in the mixed-stock ocean fishery are in a depressed condition and cannot withstand fishing pressure to the same de-

---

for the use of the best scientific information available. 16 U.S.C. 1851(a)(2). In addition to these standards, the Secretary's actions must be faithful to "any other applicable law." 16 U.S.C. 1854(a)(1)(A).

gree as healthier stocks. If ocean fisheries were permitted to catch a full 50% of the harvestable portion of the mixed stock of fish at sea, then the weaker runs of fish would be so depleted that few or none would be available to Indian fisheries on the rivers. Conversely, if non-Indian ocean fisheries are required to end their season when they have harvested that quantity of the *weakest* run of fish which would leave to the treaty fishermen an equal share of the harvestable portion of that run, they would not be able to harvest the full quantity of the stronger runs that would otherwise be available to them.[3]

3. In 1980 and 1981 the Secretary's management plan for Washington north coast coho was predicated upon a system of single species aggregation intended to allow the Washington coastal tribes collectively to take 50% of the harvestable number of coho returning to the combined coastal river systems. This resulted in a return to some of the river systems of fewer fish than were necessary to achieve both the State-established spawning escapement goal for that river and a tribal harvest of their treaty share of the run. *Hoh*, 522 F. Supp. at 687.

In 1981, both petitioner and the Hoh, Quileute, and Quinault Tribes brought suit to challenge the Secretary's management plan. The tribes' suit, *Hoh Indian Tribe* v. *Baldrige*, *supra*, was brought on June 22,

---

[3] These excess quantities of the stronger runs of fish, not harvested by ocean fisheries, would be available to treaty fisheries, non-treaty fisheries, or Canadian fisheries in the case of fish native to Canadian rivers. Absent agreement of the affected tribe or endorsement by the court, the additional quantity of fish caught by some treaty fisheries under this river-by-river, run-by-run system of allocation would not generally be used to offset their entitlement to a fair share of the weaker runs. 522 F. Supp. at 690.

1981. The tribes sought reductions either in the ocean harvest or in the State's spawning escapement goals. The tribes' legal theory was that the treaties envisioned approximately equal sharing on a river-by-river, run-by-run basis. The Secretary agreed that this was the general, although not inflexible standard, wherever practical, and pointed out that the expected ocean harvest level in the 1981 plan would result in such roughly equal sharing if the State's spawning escapement requirements were moderated. The district court ruled that the State's escapement goals could not be justified on grounds of conservation of the resource, and therefore invalidated them. *Hoh*, 522 F. Supp. at 690-691. The court declined to disturb the Secretary's plan for ocean fishing. It approved the proposition that the river-by-river, run-by-run allocation principle is not inflexible, but that departures from it should be the subject of agreement of the parties or future application to the court (*id.* at 690). The district court also ordered the parties to negotiate a long-term framework for the control of these fisheries, which effort is still in progress (*id.* at 692). No appeal was taken in *Hoh*.

The State of Washington and petitioner herein each sought leave to intervene in the *Hoh* litigation, and each motion was initially denied. The State later renewed its application, which was then granted. Petitioner did not renew its application, but appealed the initial denial. The Ninth Circuit affirmed the denial of intervention, on the basis that the aggregate allocation argument which petitioner sought to interject by way of intervention was foreclosed by *United States* v. *Washington*, *supra*, and *Fishing Vessel*, *supra*. *Hoh Indian Tribe* v. *Baldridge*, 676 F.2d 710 (9th Cir. 1982) (unpublished opinion), cert. denied, No. 82-173 (Oct. 4, 1982).

The instant case was filed by petitioner on July 10, 1981. Petitioner contended that the Secretary managed the ocean fishery in an overly restrictive way, upon an overly expansive interpretation of the tribes' treaty rights. Specifically, in its third cause of action, petitioner alleged that the Secretary's 1981 harvest quota of coho salmon of 620,000 (372,000, or 60%, to the commercial fishery and 248,000, or 40%, to the recreational fishery) was too small, because it would not satisfy nontreaty fishermen's entitlement to one half of the aggregate of all salmon bound for Washington coastal streams. For example, in order to ensure that sufficient numbers of the depressed Hoh River fall coho run would return to give the Hoh tribe an equal harvest share and also provide adequate spawning escapement, the ocean fishery had to be limited to a degree far less (several hundred thousand fish fewer) than would have been necessary to accommodate tribal rights to other, stronger runs. In petitioner's view, the Secretary was wrong to regulate on the premise that the tribes have a right in each run of salmon passing through their respective reservations or usual and accustomed fishing grounds, rather than a right only to a collective equal harvest of the total quantity of treaty fish.

In February 1982, on cross-motions for summary judgment, the district court in the instant case held (Pet. App. 2-3) that the basic river-by-river, run-by-run rule articulated in *Hoh* is not inflexible; but the court rejected petitioner's position as fundamentally inconsistent with *Hoh* and with *United States* v. *Washington*, *supra*, and *Fishing Vessel*, *supra*.[4] On

[4] **The district court below did not dispose of petitioner's first and second causes of action. These were subsidiary claims, alleging certain other flaws in the Secretary's 1981 regulations, and are not at issue here.**

appeal, the Ninth Circuit upheld the district court's ruling (Pet. App. 13-15). The appellate court also rejected petitioner's claims that the optimum yield standard of the Act, 16 U.S.C. 1851(a)(1), required the Secretary to allocate the salmon harvest as it proposed and that the Act impliedly repealed the Stevens treaties (Pet. App. 15-20).

ARGUMENT

Management of the North Pacific anadromous fish resources under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, presents numerous complex problems, both technical and equitable. The Secretary of Commerce, entrusted by Congress with this responsibility, is engaged in a continuing process of developing a fair and workable management approach, in consultation and cooperation with affected parties and under the continuing jurisdiction of the United States District Court for the Western District of Washington. We do not contend that the 1981 management plan at issue here is perfect in all respects; indeed, significant revisions have been made in subsequent plans with the agreement of affected parties. But we must emphatically disagree that petitioner's proposed approach, in its present form,[5] is either required by law or clearly preferable as a matter of policy, or that the management plan at issue, already reviewed in *Hoh Indian Tribe* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981), is outside the scope of the Secretary's discretion under the Act. We submit that further consider-

[5] The precise nature of petitioner's allocation concept was never spelled out in the district court. Petitioner never made clear whether it meant to apportion all species of salmon among all tribes on the basis of numbers of fish, weight of catch, value of catch, or some combination thereof.

ation of this controversy by this Court at this time would serve no useful purpose; rather, the process of negotiations and technical improvements now underway should be permitted to proceed.[6]

1. Petitioner agrees that an allocation system that would guarantee each treaty fishery 50% of each run of fish "would be ideal" (Pet. 10-11).[7] The advantages of a run-by-run allocation system are indeed substantial. Not only does the run-by-run method reduce the need to make adjustments for the differences in value among species and runs of fish, as petitioner observes (Pet. 34 n.15), it may also reduce disparities between tribes and disruptions in the traditional times and places of tribal fishing. An allocation system based on regional aggregates could leave the tribes that have comparatively weaker runs

---

[6] The controversy is not technically moot, for the reasons set forth in *United States* v. *Oregon*, 718 F.2d 299 (9th Cir. 1983).

[7] The run-by-run allocation method is consistent with this Court's statement in *Fishing Vessel* (443 U.S. at 679) that

> In our view * * * the treaties * * * secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas.

We do not contend that *Fishing Vessel* mandated that ocean harvest restrictions always be set on the basis of run-by-run allocation or intended to restrict the flexibility of the Secretary and the lower courts to develop equitable methods for implementing the basic principles of fair and equal shares. See 443 U.S. at 685-686; see also *Hoh*, 522 F. Supp. at 688 ("flexibility in the management of fisheries, both in the ocean and in the rivers[,] * * * is necessary in order to make possible the 50-50 sharing result required by law"); *United States* v. *Washington*, 384 F. Supp. at 343 ("precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience").

through their usual and accustomed fishing places with significantly less than their fair and equal share of treaty fish.

But like petitioner, the Secretary and the courts have recognized that realities do not permit invariable application of a run-by-run allocation approach. Other factors—the impact on domestic harvest (both treaty and nontreaty), the overriding concern for conservation and replenishment of the resource, the unequal strength of various returning runs, the uncontrollable extrajurisdictional harvest, and the nonfishery related mortality of fish, among others—may necessitate deviations from the "ideal," whether this entails use of limited regional aggregations,[8] river-by-river allocation,[9] aggregation within or among species,[10] or other means.

---

[8] The regional aggregate approach was ordered by the court in *United States* v. *Washington*, 459 F. Supp. at 1070, for use in part of the Puget Sound region. The regional aggregate approach guarantees treaty fishermen as a whole their share of harvestable fish, but unless carefully limited does not guarantee each tribe its share, or protect the viability of each usual and accustomed fishing place.

[9] The basic principle of river-by-river allocation was endorsed by the court in *United States* v. *Washington*, 459 F. Supp. at 1070:

> The shares which treaty and nontreaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river-system by river-system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs.

A river-by-river allocation guarantees each tribal fishery its share of the total harvestable fish passing by the usual or accustomed fishing place, but does not guarantee that share of each *run* of fish passing through.

[10] The approach adopted by the Secretary pursuant to agreement with the affected tribes and approved by the district

The Secretary's approach to fisheries management takes these realities into account through a continuing process of technical data improvement and negotiation. There can be no doubt that this approach is in accord with the purposes (16 U.S.C. 1801(b)), policy (16 U.S.C. 1801(c)), and standards (16 U.S.C. 1851) of the Act. There is, therefore, no reason to disturb the Secretary's exercise of discretion under the Act.

2. In any event, we submit that petitioner's insistence on an alternative approach is untenable. Petitioner proposes (Pet. 18) "a regional, species aggregate system * * * [that] would adopt a flexible ocean management scheme designed to return enough harvestable fish to the coastal streams so that each coastal Indian fishery could harvest 50% of the overall harvestable fish (by weight, number, or commercial value) subject to its treaty rights." In its current form, this "proposal" is little more than expression of the wish that the complexities of fisheries management would resolve themselves. Petitioner does not suggest how such a "flexible ocean management scheme" would be devised; yet it asks this Court to adopt its proposal in place of an actual working plan (whatever its weaknesses), and thus to supplant the current process of court-supervised negotiation between the Secretary, the State, and the

---

court on September 4, 1982, essentially adopts a species-by-species, river-by-river allocation approach. This guarantees each tribal fishery its share of each species that passes through its usual and accustomed fishing place but does not guarantee that share of each run of such species. For example, the harvest from the spring run of coho salmon may be deficient, but the difference compensated for during the autumn run.

affected parties to improve the plan in a responsible and, if possible, mutually acceptable manner.

As matters now stand, petitioner's assurances that its proposal would protect the Indians' treaty rights "without disrupting present, place-specific fishing patterns" (Pet. 19 n.8) cannot be supported in fact. A regional aggregate approach could admittedly protect the rights of treaty fishermen as a whole, but by definition it would not protect the rights of each individual tribe, much less maintain the viability of each usual and accustomed fishing place. It is not debated, for example, that if petitioner's approach had been employed in the 1981 season, the Hoh Tribe would have been left with few if any coho to harvest on the Hoh River, although other tribes might have fared somewhat better.[11]

Given the Indians' right "of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory" (Treaty of Olympia, July 1, 1855, art. III, 12 Stat. 972), the court of appeals was correct in holding that "the Stevens treaties preclude adoption of an aggregate approach as the exclusive rule of salmon allocation" (Pet. App. 17).[12] Petitioner is free to propose modifications of the fisheries management plan to the Secretary, and to work with other interested parties toward an

---

[11] Petitioner's approach also incorrectly presumes that the entire nontreaty share of the salmon catch must be harvested by ocean fisheries. However, any imbalance in treaty-nontreaty shares could be ameliorated if the State chose to establish fisheries near river mouths to harvest part of the nontreaty share of the stronger runs.

[12] We do not read the court of appeals' opinion to preclude equitable adjustments to, or deviations from, a strict run-by-run allocation system. See Pet. App. 16 & n.6.

equitable solution to this problem. But petitioner has suggested no rule of law that mandates overturning the Secretary's plan in favor of its ill-developed alternative.

3. We agree with petitioner (Pet. 45) that no inconsistency exists between the Act and the Stevens Treaties, and it is therefore not necessary to address in detail the argument (Pet. 46-48) that the Act impliedly abrogated those treaties in part. The Act expressly requires the Secretary's plans to comport with "other applicable law" (16 U.S.C. 1854(a)(1)(A)), which includes treaties. In any event, the Act evinces no explicit intention to abrogate the Stevens Treaties, and therefore should not be held to do so. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

ANNE S. ALMY
DONALD A. CARR
JAMES C. KILBOURNE
Attorneys

DECEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 427803 174